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MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-6356

JOHN DOE, *et al.*,
Petitioners,

v.

JOHN L. McMILLAN, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONERS

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OPINIONS BELOW

The opinion of the court of appeals (App. 67-113) is not yet officially reported. The opinion of the court of appeals of March 11, 1971, imposing a modified injunction pending determination of an expedited appeal (App. 57-64) is reported at 442 F.2d 879. The order of the

United States District Court for the District of Columbia dismissing the complaint on January 11, 1971 (App. 48-50) has not been officially reported.

JURISDICTION

The judgment of the court of appeals was entered on January 20, 1972. The petition for writ of certiorari was filed on March 18, 1972. Certiorari was granted on June 26, 1972. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the publication of a report by the House of Representatives constitutes a Bill of Attainder where the report contains the names of impoverished school children, together with highly embarrassing, scandalous and possibly libelous excerpts from private and confidential school records such as failing test papers, lists of supposed absentees and class-cutters, and disciplinary records including memoranda alleging sexual immorality and criminal conduct.

2. Whether the Speech or Debate Clause of the Constitution requires a dismissal by the federal judiciary of an uncontroverted complaint by a group of impoverished parents on behalf of their school-aged children against congressmen who were members of a congressional committee, alleging that the congressmen unconstitutionally, tortiously and without any legislative purpose whatsoever violated petitioners' constitutionally protected right of privacy by ordering the Government Printing Office to publish a committee report containing

the names of the children, together with highly embarrassing, scandalous and possibly libelous information derived surreptitiously and unlawfully from private and confidential school records.

3. Whether the Speech or Debate Clause of the Constitution is so sweeping in its coverage that it requires a dismissal by the federal judiciary of an uncontroverted complaint against congressional committee staff members, a consultant to the committee, an investigator for the committee, and officials and employees of the Government Printing Office who participated in an unconstitutional and intentionally tortious violation of petitioner's right of privacy by the disclosure and publication of petitioners' names, together with highly embarrassing, scandalous and possibly libelous information derived from their private and confidential school records.

4. Whether the doctrine of official immunity requires a dismissal by the federal judiciary of an uncontroverted complaint against congressional committee staff members, a consultant to the committee, an investigator for the committee, officials and employees of the Government Printing Office, and officials and employees of the District of Columbia public school system, who participated in an unconstitutional and intentionally tortious violation of petitioners' right of privacy by the disclosure and publication of petitioners' names, together with highly embarrassing, scandalous and possibly libelous information derived from their private and confidential public school records.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 6, Clause 1 of the Constitution provides, in pertinent part, that

> The Senators and Representatives . . . for any Speech of Debate in either House . . . shall not be questioned in any other Place.

Article I, Section 9, Clause 3 of the Constitution provides, in pertinent part, that

> No Bill of Attainder or ex post facto law shall be passed.

The Fourth Article of Amendment to the Constitution provides that

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Article of Amendment to the Constitution provides, in pertinent part, that

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . .; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . . .

The Ninth Article of Amendment to the Constitution provides that

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

The Tenth Article of Amendment to the Constitution provides that

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATEMENT OF THE CASE

Petitioners, impoverished parents and their children, filed a class action in the United States District Court for the District of Columbia seeking a declaratory judgment, injunctive relief and damages, claiming that they and their children had been subjected to a bill of attainder and that their common law and constitutionally protected right of privacy had been violated when employees and officials of the District of Columbia school system divulged confidential, highly embarrassing and privileged records and information concerning the school children to an investigator working with the staff of the House of Representatives Committee on the District of Columbia, and thereafter, when these private, confidential and privileged documents were published by the Government Printing Office in a Report of the House District Committee [House Report No. 91-1681, 91st Cong. 2d Sess., (App. p. 44)].[1]

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[1] Defendants named in the complaint were John L. McMillan, the Chairman; the other members of the House of Representative Committee on the District of Columbia; the Clerk, Staff Director and Counsel of the Committee; a consultant to the Committee; an

The Committee's investigation and Report were ostensibly authorized by a Resolution of the House of Representatives which stated that the Committee on the District of Columbia

> . . . is authorized to conduct a full and complete investigation and study of . . . (1) the organization, management, operation and administration of any department or agency of the government of the District of Columbia; (2) the organization, management, operation and administration of any independent agency or instrumentality of government operating solely in the District of Columbia; . . . [H. Res. 76, 91st Cong. 1st Sess., Feb. 5, 1969 (App. pp. 45-46)].

The Resolution only implicitly authorized an investigation of the District of Columbia public schools, and it clearly did not authorize an inquisition into the private, confidential and privileged records of individual pupils who are entitled to a high standard of fiduciary trust on the part of school and government officials and to a high degree of confidentiality and privacy in the retention of disciplinary, counseling and academic records created as a result of their attendance in public schools under the compulsion of law. Indeed, the resolution authorizing the investigation made no provision nor did it authorize the collection of any information or documents through any means except by production at hearings of the Committee or subcommittee (App. 44). The information and

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investigator for the Committee; the Superintendent of Documents and the Public Printer of the Government Printing Office; the Members of the Board of Education of the District of Columbia; the Superintendent of the Public Schools of the District of Columbia; the Principal and a teacher at the Jefferson Junior High School; and the United States of America.

documents involved here were not produced or obtained at hearings; rather, they were surreptitiously obtained by the Committee's investigator (Respondent Martin, who was also employed as a sergeant of the Metropolitan Police Department) from a teacher (Respondent Irven) and the principal (Respondent Savoid) of Jefferson Junior High School (App. 9; Complaint, para. 7) in "clandestine or semi-clandestine ways" (App. 27; hearing on motion for temporary restraining order). Thereafter, the Committee's investigator delivered the information and documents to a contract consultant to the Committee (Respondent Little) who caused copies of the documents to be included in the Report (App. 9; Complaint, para. 8).

The Report, entitled "Investigation and Study of the Public School System of the District of Columbia", was ordered to be printed on December 8, 1970, by "The Committee of the Whole House on the State of the Union", to which it had been committed pursuant to a transmittal letter of the same date (App. 47) from respondent John L. McMillan as Chairman of the Committee on the District of Columbia to the Speaker of the House. Thus, the Report was initiated by a Resolution of the full House of Representatives, and it was ordered into print by the full House of Representatives sitting as the Committee of the Whole House on the State of the Union.

Involved here is the publication and distribution, by order of the full House of Representatives, of information and names never spoken on the floor of the House nor spoken by congressmen in committee hearings, yet in a context which is clearly derogatory, embarrassing, possibly libelous, and in violation of petitioners' consti-

tutionally protected right to be left alone—the right to privacy.

The authorizing Resolution did not request or even suggest that confidential school papers or the names of failing students, delinquents or class-cutters be obtained and published. The authorizing Resolution did not state that the Committee staff was to investigate the discipline problems of the schools or the scholastic records of children; nor did it authorize the illegal collection of private and protected information about school children or the publication of a list of the names of children who were cutting classes, suspected of sexual depravity, or failing academically. Nowhere did the Resolution call for the collection or publication of tests, including the names of children, or of disciplinary letters or other disciplinary memoranda with the names of the students and their parents or guardians. The Resolution clearly did not contemplate the surreptitious, clandestine and broad inquisition which was conducted, nor did it authorize the sensational exposé published thereafter which trammeled unmercifully upon the childrens' right of privacy.[2]

The District Court dismissed petitioners' claims as to all defendants, although none of the claims or factual allegations were controverted, on the basis that the

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[2] Although the complaint initially named all of the members of the House District Committee as defendants, the Court of Appeals on June 7, 1971, granted petitioners' subsequent motion to sever and dismiss as to Congressmen Brock Adams, Charles C. Diggs, Jr., Donald M. Fraser, Gilbert Gude, and Andrew Jacobs, Jr. The stipulation upon which such dismissal was based indicated that these Congressmen opposed the distribution of the House Committee Report so long as the names complained of remained therein and that they would have voted against the publication thereof had they been given the opportunity to do so.

federal judiciary lacked jurisdiction to entertain claims by private citizens against any of the defendants. The claims against the defendants of the legislative branch of the federal government were dismissed "under the official immunity doctrine of *Barr v. Matteo*, 360 U.S. 564" (1959) (App. 49); the claims against the District of Columbia defendants were dismissed because "it is clear that the acts were discretionary and not ministerial" (App. 49); and the claims against the United States were dismissed because "it would appear that the United States is being sued under the Federal Tort Claims Act" and that the plaintiffs had failed to exhaust the required administrative remedies (App. 49). The dismissal was by written order although none of the defendants had filed a motion to dismiss or any other responsive pleading or memorandum of law and although the court had only heard oral arguments on the question of plaintiffs' request for a temporary restraining order. At the conclusion of the oral arguments, the court dismissed the entire complaint "as being frivolous" (App. 41). Thereafter, the District Court entered its four-page order, which was prepared by counsel for the United States (App. 48-50).

The courts below permitted petitioners to proceed in fictitious names to preclude further embarrassment to them and to maintain the action *in forma pauperis* because petitioners were impecunious. This Court's order granting certiorari also granted petitioners leave to proceed *in forma pauperis* in this Court. Petitioners' separate motion for leave to proceed in fictitious names has not been acted upon by this Court. All of the petitioners are Black. (App. 6).

In the Court of Appeals, petitioners moved immediately for summary reversal, and the defendants-appellees

moved for summary affirmance. On January 14, 1971, a panel of the Court of Appeals issued an injunction to preserve the status quo until responses were filed. (App. 54-55). That order did not enjoin members of the Congressional Committee or the United States, but it did prohibit the other defendants from any further publication and distribution of the private information, whether published in the Report or otherwise, so long as those papers or the Report contained the names and the addresses of the pupils or their parents. On March 11, 1971, a panel of the Court of Appeals (Judges Fahy and Leventhal, with Judge Tamm dissenting) continued the earlier injunction but restrained only the further publication or disclosure of the pupils' and their parents' names (442 F.2d 879; App. 57-64). This interim opinion by the Court of Appeals concluded that the petitioners' claim that they would be publicly stigmatized *was a substantial claim* and that the claims of invasion of constitutional privacy, lack of proper legislative purpose to warrant such an invasion, and the broadcasting of names and identities were claims worthy of serious consideration on the merits. The interim opinion by the Court of Appeals also noted that the dimensions of the constitutional issue had been heightened by the recent decision of this Court in *Wisconsin v. Constantineau*, 400 U.S. 433 (January 19, 1971), which held that the official publication of a list of names stigmatizing individuals, without notice or hearing, violated due process of law. Two justices of this Court concluded, in that case, that the list constituted a bill of attainder, a point not reached by the majority.

Thereafter, the parties filed briefs, and the court heard oral arguments, on an expedited schedule. On January 20, 1972, a different panel of the court of appeals (Judge

MacKinnon and Senior Circuit Judge Miller, with Judge Wright dissenting) entered its opinion which petitioners have now brought to this Court for review (App. 67-113).

The result of the lower court's decision was, first, to immunize not only congressmen from suit under the Speech or Debate Clause, but also staff members, consultants, and investigators of a congressional committee, and officials and employees of the Government Printing Office, none of whom were close personal aides of a congressman—all on the basis of the Speech or Debate Clause. Secondly, the lower courts immunized from suit the District of Columbia defendants under the official immunity doctrine. Thirdly, the lower courts also extended the ruling on the official immunity doctrine question to immunize the non-congressmen federal employees, in addition to the immunity granted them under the Speech or Debate Clause (App. 86; text at note 22).

The issues raised in this case are not moot. Only by the continuous protection of the injunction issued by the court below have respondents been restrained from further publication or distribution of the Report containing petitioners' names. By order of the court below, this injunction shall continue in effect until final action by this Court (App. 116). In addition, petitioners still pursue their claim that the violation by the respondents of their common law, constitutional and statutory (42 U.S.C. § 1983) rights allows them to maintain an action for damages against all respondents or, at the least, the non-congressmen respondents.[3]

[3] The Congressional Report must be examined in order to appreciate the full significance of the invasions of privacy it represents. Rather than reprint pertinent parts in the Appendix, which could not be done without risking further invasions of

SUMMARY OF ARGUMENT

The acts of respondents were serious violations of petitioners' right to privacy. The unauthorized disclosure of private, confidential and privileged student records by respondent school officials and the unauthorized procurement and publication of them by the legislative respondents, including petitioners' names and addresses contained in highly embarrassing, scandalous and possibly libelous contexts, violated petitioners' constitutional and common law right of privacy. Accordingly, petitioners have a cause of action for declaratory judgment, injunctive relief and damages. This cause of action was properly brought before the federal judiciary, and the maintenance of the action may be limited only, if at all, by the doctrine of separation of powers, by the Speech or Debate Clause of the Constitution, or by the ancient doctrine of official (sovereign) immunity. None of these impediments exist in this case, singly or in combination, to bar petitioners' action.

The doctrine of separation of powers is inoperative in this case as a restraint upon the judiciary to entertain this action or grant injunctive relief or damages. Judicial deference to other branches of government "cannot yield to an unnecessary and unreasonable dissipation of precious constitutional freedoms." *Watkins v. United States*, 354 U.S. 178, 204 (1957). The separation of powers doctrine does not, of its own force, bar judicial review of congressional investigations. *United States v. Rumely*,

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petitioners' privacy, we have submitted one copy of its pertinent part (pages 210-257) pertaining to the students of Jefferson Junior High School (petitioners herein), in a sealed envelope, together with a letter to the Clerk of this Court requesting that it be made available for inspection only by Court personnel.

345 U.S. 41 (1953), *Kilbourn v. Thompson*, 103 U.S. 168 (1880), *Powell v. McCormack*, 395 U.S. 486 (1969), *Barenblatt v. United States*, 360 U.S. 109 (1959). See also, *Baker v. Carr*, 369 U.S. 186 (1962).

Immunity from suit under the Speech or Debate Clause does not apply in this case to *any* of the respondents, because not even congressmen are protected by the Clause from answering for direct violations of private citizens' constitutional rights. Only valid legislative acts are immunized from judicial scrutiny by the Clause. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), *Kilbourn v. Thompson, supra, Dombrowski v. Eastland*, 387 U.S. 82 (1967), *Powell v. McCormack, supra*, and *Gravel v. United States*, ___U.S.___ (Slip Opinion, June 29, 1972). Here neither the procurement nor the method of obtaining the student records were authorized, and apart from the irregular and unauthorized procedures which violated fundamental precepts of procedural due process, the Constitution itself places limits on congressional inquiries and actions through, for example, the prohibition of bills of attainder and the protection of citizen privacy.

Official (sovereign) immunity is not a bar to the maintenance of this action against either the federal or the District of Columbia respondents. In the District of Columbia the application of the judge-made jurisdictional defense of official immunity has been restricted so that it applies only to discretionary functions and not to ministerial ones; and it has been even further restricted so as to be available as a defense only when judicial redress would jeopardize the quality and efficiency of government itself. *Elgin v. District of Columbia*, 337 F.2d 152 (D.C. Cir. 1964), *Carter v. Carlson*, 447 F.2d 358 (D.C. Cir. 1971), *cert. granted* on a separate issue *sub nom.*

District of Columbia v. Carter, ___U.S.___, 30 L.Ed.2d 161 (1972). To the extent that petitioners' action was dismissed on the grounds of official immunity, without specific determination of whether judicial redress would jeopardize the quality and efficiency of government itself, the dismissal was premature, it was clearly precluded by governing precedent in the District of Columbia, and it failed to dispose of the separate question of liability by the District of Columbia respondents under the Civil Rights Act of 1871 (§ 1, R.S. § 1979, 42 U.S.C. § 1983), and of the federal respondents under the doctrine articulated in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

This Court should reverse the decision of the lower court, declare that petitioners may maintain in federal court their action against each and every respondent, articulate the inapplicability in this case of immunity under the Speech or Debate Clause and the doctrine of separation of powers, and require, upon remand, the application of *stare decisis* principles on the question of official immunity in the District of Columbia.

ARGUMENT

I.

THE RIGHT TO PRIVACY IS A FUNDAMENTAL CONSTITUTIONAL RIGHT WHICH PROTECTS THE CONFIDENTIAL AND PRIVILEGED NATURE OF STUDENT RECORDS AND PAPERS IN PUBLIC SCHOOLS

The petitioners, minor school children and their parents, contend that their right of privacy, based upon the Bill of Rights, has been violated by the unreasonable search, seizure and publication of the highly personal and confidential information included in the hearing report complained of herein.

Such "right of privacy"[4] or "right to be let alone"[5] is a legal recognition of the private and personal sphere belonging to each individual, which our limited government may not transgress. It is a well-established common law right in the United States.[6]

Mr. Justice Brandeis, in his famous dissent in *Olmstead v. United States*, 277 U.S. 438 (1927), gave the right its classic characterization (277 U.S. at 478):

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

The concept of a limited government, around which our Constitution was written, has always included the principle that governmental powers stop short of certain intrusions into the personal life of the citizen. Indeed, this principle represents a basic distinction between an absolute and a limited government. The complete control over the life of the individual which is the hallmark of an

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[4] Warren and Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).

[5] Cooley, *Law of Torts*, 29 (2d ed. 1888).

[6] Prosser, *Privacy*, 41 Calif. L. Rev. 383 (1960); Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U.L. Rev. 962 (1964).

absolute government is totally alien to our form of government which safeguards the private sphere belonging to the individual.

The great charter of protection for this private sphere is the Bill of Rights, specifically delineating the principles of a limited government which permeate our Constitution. The Honorable Erwin Griswold has called the right of privacy the "underlying theme of the Bill of Rights."[7]

The concept of individual privacy contained in the Bill of Rights derives from ancient theological and philosophical precepts. Once our civilization made the distinction between the life of the soul and the life of the body, between the realm of God and the realm of Caesar, between inherent and inalienable rights belonging to the people and limited rights granted to a government, it became essential to recognize, in turn, the concept of a private sphere belonging to every individual, in which one may become and remain "himself."[8]

It is the violation by the respondents of this private sphere, as incorporated in our constitutional framework of a limited government, of which petitioning school children and their parents complain in the case at bar.

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[7] Griswold, *The Right To Be Let Alone*, 55 N.w.U.L. Rev. 216 (1960).

[8] *See* John Locke, *The Second Treatise on Civil Government* (Everyman's Library, 1924); Immanuel Kant, *Metaphysical Elements of Justice* (Bobbs-Merrill, 1965); Ralph Waldo Emerson, "Essay on Fate" in *The Conduct of Life* (Dutton, 1899).

A. The Concept of Individual Freedom From Governmental Restraint Is a Venerable Tradition of the Common Law.

Boyd v. United States, 116 U.S. 616 (1886),[9] is the first definitive decision of this Court, interpreting the Fourth and Fifth Amendments, on the basis of a right of privacy theory. *Boyd* was a civil action brought by the government to declare forfeit thirty-five cases of plate glass alleged to have been imported by the Boyd brothers in violation of the customs laws. The district court judge issued a subpoena directing the Boyds to produce an invoice covering a prior shipment of glass. The invoice was an essential element in the government's case. The Boyds complied with the subpoena under protest. The verdict was against the Boyds; but this Court reversed, holding that the doctrines of the Fourth and Fifth Amendments (116 U.S. at 630):

> ... apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property. ...

In *Boyd*, a statute existed specifically authorizing the government's action. In the case at bar, only a general, vague House of Representative's Resolution allegedly authorizes the respondents' actions (App. 45-46). In

[9] *Accord, Ex parte Jackson*, 96 U.S. 727 (1878); *Kilbourn v. Thompson*, 103 U.S. 168 (1880); *In re Pacific Railway Commission*, 32 Fed. Rep. 241 (Cir. Ct. Calif. 1887) (Opinion by Mr. Justice Field, sitting by designation); and *Union Pacific Railway Company v. Botsford*, 141 U.S. 250 (1890).

Boyd, a definite governmental interest was at stake in prohibiting customs law violations. The production of the invoice was an integral part of the governmental effort. Here there is no legitimate governmental interest in the use or the publication of the names of minor school children.

The *Boyd* decision was primarily based on the English case, *Entick v. Carrington*, 19 Howells State Trials 1029 (1765), generally regarded as a permanent monument in the development of the British concepts of individual freedom from governmental restraints. The facts in *Entick* are remarkably similar to the facts in this case. There the Secretary of State issued general executive warrants to his messengers, authorizing them to go about the country and to seize persons who were allegedly libelling the sovereign. Entick, a strong critic of the Crown, was the victim of one such general search, during which his seditious publications were impounded. He brought a successful damage action for trespass against the messengers. The verdict was sustained on appeal.

Here the House of Representatives passed a general Resolution authorizing investigations into any agency of the government of the District of Columbia. Allegedly pursuant to this Resolution, an agent of the House Committee[10] obtained numerous documents from the school system without the petitioners' knowledge. These documents included test papers and disciplinary reports which contain highly confidential and personal information concerning the petitioners.

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[10] Respondent Louis Martin was a Sergeant of the District of Columbia Metropolitan Police Department and an investigator of the Committee. Without the benefit of a hearing below, petitioners were unable to ascertain in which capacity he was acting, or under what color of authority he pretended to act, while obtaining the information on which the Report was based.

In *Entick*, Lord Camden concluded that if such sweeping warrants were judicially approved, then (19 Howells State Trials at 1063):

> . . . the secret cabinets and bureaus of every subject in this kingdom will be thrown open to search and inspection of a messenger, whenever the secretary of state shall think fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel.

The facts herein represent just as serious an invasion of petitioners' constitutional rights and present grave overtones for our concept of a limited government.

The essence of these early decisions is that the Bill of Rights, specifically the Fourth and Fifth Amendments, also prohibit government action that is not strictly a search or seizure but is an intrusion into the privacy of the individual citizen, whether of his home, his person, or his effects.[11] Such an intrusion is exactly the governmental action of which the petitioning school children and their parents complain to this Court. Petitioners pray this Court to affirm once again the venerable principle of individual freedom from governmental restraint.

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[11] Beaney, *The Constitutional Right to Privacy in the Supreme Court*, 1962 Sup. Ct. Rev. 212.

B. Recent Decisions of This Court Affirm the Constitutional Basis of Individual Privacy

The decisions of this Court have continued the recognition that the concept of individual privacy has a constitutional basis. Individual privacy has been the basic theory of numerous opinions dealing with the First Amendment,[12] the Fourth Amendment,[13] and the Fifth Amendment.[14]

In *Wolf v. Colorado*, 338 U.S. 25 (1949), this Court described the citizen's immunity from unreasonable search and seizure in terms of "the right of privacy." In holding that the Due Process Clause of the Fourteenth Amendment protected a citizen's right of privacy, Mr. Justice Frankfurt wrote for the Court (338 U.S. at 27-28):

> The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in "the concept of ordered liberty" and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a preclude to a search, without authority of the police, did not need the commentary of recent history to be condemned

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[12] *Public Utilities Commission v. Pollak*, 343 U.S. 451 (1951); *NAACP v. Alabama*, 357 U.S. 449 (1958); *Stanley v. Georgia*, 394 U.S. 557 (1969).

[13] *Boyd v. United States*, 116 U.S. 616 (1886); *Ex parte Jackson*, 96 U.S. 727 (1878); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Katz v. United States*, 389 U.S. 347 (1967); *Silverman v. United States*, 365 U.S. 505 (1961); *Camara v. Municipal Court*, 387 U.S. 523 (1967); *United States v. United States District Court*, ___U.S.___, 32 L.Ed. 2d 752 (1972).

[14] *Watkins v. United States*, 354 U.S. 178 (1957).

as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples.

In *Mapp v. Ohio*, 367 U.S. 643 (1961), this Court concluded that a warrantless search by police officers violated the Fourth Amendment, as applied to the States through the Fourteenth Amendment. The Court referred to the right of privacy as "basic to a free society." 367 U.S. at 656.

In *NAACP v. Alabama*, 357 U.S. 449 (1958), this Court held that a state's requiring the production of a membership list violated the petitioners' freedom of association guaranteed by the First Amendment. The Court spoke of the right of privacy as "indispensable" to the preservation of freedom of association. 357 U.S. at 462.

In *Watkins v. United States*, 354 U.S. 178 (1957), this Court overruled a contempt conviction based on the defendant's refusal to answer certain questions before a congressional committee. The Court stated (354 U.S. at 198-199):

> We cannot simply assume, however, that every congressional investigation is justified by a public need that overbalances any private rights affected. To do so would be to abdicate the responsibility placed by the Constitution upon the judiciary to insure that the Congress does not unjustifiably encroach upon an individual's right to privacy nor abridge his liberty of speech, press, religion or assembly.

In *Stanley v. Georgia*, 394 U.S. 557 (1969), this Court found unconstitutional under the First Amendment a Georgia "obscenity" statute. The Court concluded that

the statute represented an unconstitutional governmental intrusion into an individual's privacy.

In *Camara v. Municipal Court*, 387 U.S. 523 (1967), this Court held that the Fourth Amendment prohibited a warrantless search of a dwelling for the purposes of a housing code inspection. The Court held that the basic purpose of the Fourth Amendment was to "safeguard the privacy and security of individuals against arbitrary invasions by governmental officials" 387 U.S. at 528.

As recently as its last term, this Court held unconstitutional under the Fourth Amendment electronic surveillance, without a search warrant, for the purposes of protecting against an alleged domestic conspiracy to destroy government property. *United States v. United States District Court*, ___U.S.___, 32 L.Ed. 2d 752 (1972). Mr. Justice Douglas, in a concurring opinion, stated: "The Warrant Clause has stood as a barrier against intrusions by officialdom into the privacies of life." ___U.S. at ___, 32 L.Ed. 2d at 775.

The right of privacy received its most definitive recognition by this Court in *Griswold v. Connecticut*, 381 U.S. 479 (1965). In a seven to two decision, the Court held unconstitutional a state law under which the petitioners were prosecuted for giving married persons information and medical advice on the use of contraceptives. The Court based its holding squarely on the right of privacy which was derived by implication from the specific guarantees of the Bill of Rights. Mr. Justice Douglas cited numerous cases of this Court, including many of those cases cited herein, and concluded that:

> These cases bear witness that the right of privacy which presses for recognition here is a legitimate one. The present case, then, concerns a relationship

lying within the zone of privacy created by several fundamental constitutional guarantees. 381 U.S. at 485.

Mr. Justice Goldberg, in an opinion which Chief Justice Warren and Mr. Justice Brennan joined, concluded that the right of privacy was one of the fundamental rights which was not explicitly mentioned in the Constitution but which was implicit throughout the entire framework of the Constitution, and thereby guaranteed to the people through the Ninth Amendment. He said (381 U.S. at 494):

> I agree fully with the Court that . . . privacy is a fundamental personal right, emanating "from the totality of the constitutional scheme under which we live."

Mr. Justice Harlan concurred in the result, contending that the concept of privacy which the Connecticut statute violated was "implicit in the concept of ordered liberty" which underlies the Due Process Clause. 381 U.S. at 500. Mr. Justice White concurred in the result on the theory that the statute deprived citizens of their liberty without due process of law, as that concept is used in the Fourteenth Amendment. 381 U.S. at 502.

Even though the various justices reached the result by differing routes of Constitutional interpretation, this case clearly stands for the proposition that the right of privacy has a firm constitutional basis. Implicit in our scheme of limited government is the concept that there is a private sphere belonging to each individual which the government is prohibited from breaching.

C. The Facts of This Case Fall Within the Constitutional Protection of the Right of Privacy

The case at bar comes within the constitutionally protected right of privacy, especially when considered against the backdrop of the Fourth Amendment. This Court has repeatedly held that the prohibition against warrantless searches applies to civil actions, *Boyd v. United States, supra; Frank v. Maryland*, 359 U.S. 360 (1959); *Camara v. Municipal Court, supra*; and *See v. Seattle*, 387 U.S. 541 (1967). In addition, this Court has held that the protection of the Fourth Amendment enures to people, not places. *Katz v. United States*, 389 U.S. 347 (1967).

In spite of this constitutional protection, respondents ignored the petitioners' rights. Respondents all participated in obtaining personal and confidential information concerning the petitioners and caused the information to be published in the committee report. This information places petitioners in a harmful and embarrassing light in the public eye, undoubtedly haunting them for the remainder of their lives. Petitioners were not even given notice of the publication. Petitioners did not have the opportunity to challenge the use or the correctness and accuracy of the information.

The publication was not based on a legitimate legislative need, nor was it based on a legitimate legislative interest. One is hard-pressed even to conceive of a legitimate legislative interest in the use of petitioners' names. The best justification given, as set forth by the majority opinion below, is that the use of the names "lends credibility" to the report. (App. 80-81). When considering the invasion of a constitutional right, the justification of "lending credibility" cannot be allowed to

stand against the citizen's interest in preserving his privacy.

In short, petitioners contend that the respondents trampled, rough-shod, over their constitutional rights; that respondents exhibited no feeling or sensitivity for petitioners' rights; and that this Court should not allow such a gross violation of constitutional privilege to remain unremedied.

D. Respondents' Violation of Petitioners' Constitutional Rights is Exacerbated by the Fact that Petitioners Are Minor School Children

Special consideration should be given to the dissemination of information concerning children. The many governmental agencies and private groups involved in guiding our children through their formative years must necessarily collect extensive personal data in order to accomplish their tasks effectively. Without careful control of this personal data, children may be haunted for their entire lives as a result of childhood indiscretions or adjustment problems. Our judicial system surely provides protection from having to live with a constant fear of disclosure of personal information. (Dissenting Opinion of Judge Wright, App. 109).

Petitioning school children are the victims of just such a wrongful dissemination of personal data. Their names have been published abroad in a House Committee report, with no apparent substantial public interest in that information. Yet they did not voluntarily place themselves in the public eye. *New York Times v. Sullivan*, 376 U.S. 254 (1964) and *Time, Inc. v. Hill*, 385 U.S. 374 (1966). The spectre of this report will doubtless follow

them for the rest of their lives, seriously damaging their educational and employment opportunities, not to mention their mental and emotional development.[15]

This Court has previously recognized the extraordinary care which must be accorded children when evaluating the exigencies of governmental action against their constitutional rights. *Shelton v. Tucker*, 364 U.S. 479 (1960); *Tinker v. Des Moines Community School District*, 393 U.S. 503 (1969); and *In Re Gault*, 387 U.S. 1 (1967).

The special safeguards surrounding the dissemination of the records of juvenile proceedings is an example.[16] For the District of Columbia, Congress has passed an extensive statute carefully guaranteeing the confidentiality of such records.[17] Congress even provided that disclosure of records in violation of the statute would constitute a misdemeanor, punishable by a fine of $250 or imprisonment for ninety days, or both.[18] The compilation of a juvenile record is surrounded by judicial safeguards which do much to insure its reliability and accuracy. *In Re Gault, supra*. Here, however, the rights of the petitioners were completely trampled, with no regard for the completeness or accuracy of the information contained in the report.

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[15] Knovitz, *Privacy and the Law: A Philosophical Prelude*, 31 Law & Contemp. Prob. 272 (1966); Jourard, *Some Psychological Aspects of Privacy*, 31 Law & Contemp. Prob. 307 (1966); and Fried, *Privacy*, 77 Yale L.J. 475 (1968).

[16] Many states have statutes which restrict the dissemination of school records. Generally, there is a special ban on the use of the names of students. See, e.g., Cal. Educ. Code § 10751 (1969).

[17] D.C. Code §§ 16-2330 to 16-2334 (V Supp. 1972).

[18] D.C. Code §16-2335 (V Supp. 1972).

An additional factor in the case at bar weighs heavily in favor of special consideration for the violation of the petitioners' constitutionally protected right of privacy. The students attend school under a compulsory attendance statute[19] and, as a result, suffer a considerable diminution of their freedom. (Dissenting Opinion of Judge Wright, App. pp. 106-108). Thus any infringements on the students' privacy should be carefully scrutinized.[20] In *Tinker v. Des Moines Community School District*, 393 U.S. 503 (1969), this Court definitively declared that students are "persons" under the Constitution, that they are "possessed of fundamental rights" which must be respected, and that schools "may not be enclaves of totalitarianism." 393 U.S. at 511. Citing *Shelton v. Tucker*, 364 U.S. 479, 487 (1960), the Court declared that "... the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." 393 U.S. at 512.

The educational system forces the student not only to attend school but also to reveal his abilities, desires, and innermost thoughts to school authorities in numerous tests of aptitude and attitudes. The educational system is, as a result, a repository of intimate personal, potentially embarrassing information. Under such a compulsory system, the school has an added responsibility to its students and its community to act in a carefully discriminating manner in controlling and disclosing any information concerning students. The school system must

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[19] D.C. Code §31-201 (1967 ed.)

[20] *See* Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline*, 119 U. Pa. L. Rev. 545 (1971).

never disperse this private information without careful consideration of the student's interests. Our government must not force the school system to violate such a confidential relationship. This Court set forth these considerations in *West Virginia v. Barnette*, 319 U.S. 624, 637 (1942):

> That they are educating the young for citizenship is reason for scrupulous protection of constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

The actions of the respondents are certainly not conducive to protecting the rights of the student petitioners or to fostering in their minds the respect due our constitutional freedoms. Their actions degrade petitioners and have the potential for frustrating petitioners' efforts to obtain an education and thereby to continue their development as self-respecting members of society. Respondents were purportedly concerned with the quality of education in the District of Columbia. Their actions in the investigation, however, had a direct and debilitating effect on the education of the petitioners.

If Congressmen and school officials can ignore important constitutional rights with impunity, what lesson does our system of government teach?

E. Petitioners Have A Common Law Action for Damages for Invasion of Privacy.

The development of a remedy for the invasion of a constitutional right has often presented this Court with difficulties. Recently, however, this Court affirmed the ancient principle that a private citizen can maintain an action for damages for an invasion of his constitutional

rights. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The petitioner in *Bivens* was also suing for an invasion of privacy, consequent to a warrantless search and arrest. Mr. Justice Brennan, writing for the Court, said (403 U.S. at 395):

> That damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly seem a surprising proposition. Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty. (Citations omitted).

Certainly, the right to sue for damages is a hoary principle. It was the basis for the important English decision *Entick v. Carrington, supra*, wherein the plaintiff was allowed to maintain an action for damages for an illegal search and seizure of his personal papers. In fashioning the exclusionary rule as a remedy for a violation of the Fourth Amendment, this Court referred to the traditional right to maintain an action in damages for a breach of the right of privacy guaranteed by the Amendment. See, *e.g. Wolf v. Colorado*, 338 U.S. 25, 30-31 (1949).

The petitioners' right to maintain an action for damages is affirmed by the controlling common law in the District of Columbia on which the complaint herein is based. In *Peed v. Washington Times Company*, 55 Wash. L. Rep. 182 (1927), a District of Columbia court ruled in favor of a plaintiff who was suing for invasion of privacy as a result of a newspaper's unauthorized use of a picture showing the plaintiff after she had been overcome by gas fumes. The court defined the right as " . . . the right of an individual to withhold himself and his property from public scrutiny, if he so chooses." 55 Wash. L. Rep. at 183.

Various courts in the District of Columbia have reaffirmed this common law right, *Peay v. Curtis Publishing Company*, 78 F. Supp. 305 (D.C. 1948); *Afro-American Publishing Company v. Jaffee*, 366 F.2d 649 (D.C. Cir. 1966); and *Pearson v. Dodd*, 410 F.2d 701 (D.C. Cir. 1969), *cert. denied*, 395 U.S. 947 (1969).

In *Bernstein v. National Broadcasting Company*, 129 F. Supp. 817, *aff'd*, 232 F.2d 369 (D.C. Cir. 1955), *cert. denied*, 352 U.S. 945 (1956), the court set out the elements of the tort. To recover, the plaintiff must be able to show an unwarranted publication, without a waiver, of his private affairs in which the public has no legitimate concern. The publication must be of such nature as would cause mental suffering, shame, or humiliation to a reasonable person.

The limited facts which are before this Court indicate that there is a strong likelihood that petitioning school children would have been able to recover under the common law in the District of Columbia, if the trial judge had not summarily dismissed the complaint. The respondents admit that the petitioners did not waive any right to publication to their names in the hearing report. In fact, petitioners did not even know that their names were in the report until the report had been printed. The respondents have shown no legitimate public interest in the names of the petitioning school children sufficient to warrant the publication. The inclusion of the test papers and disciplinary reports are certainly of such a nature to cause mental shame, suffering, or humiliation, especially to sensitive young children and their families. Petitioners' argument that there is a reasonable basis to conclude that they may recover if allowed to prove their claim is beyond question.

Chief Justice Marshall once wrote for the Court:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

Petitioners cannot present a more concise statement of their claim herein.

F. Conclusion

The District Court did not give petitioners an opportunity to prove their claim that respondents violated their constitutional and common law right of privacy, the legal basis for which is outlined above. Both courts below held that various immunity doctrines, particularly those doctrines applying to congressmen, precluded a judicial determination of petitioners' claim. Petitioners contend herein that congressmen and other government officials are not free to violate the constitutional rights of private citizens. The Honorable Edwin Griswold precisely expressed this limitation on congressional action: "Congressmen and Senators are not magistrates with roving commissions to go about the length and breadth of the land hailing people before them to respond to what they will."[21]

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[21]Griswold, *The Right To Be Let Alone*, 55 N.w.U.L. Rev. 216, 221 (1960).

II.

THE DOCTRINE OF SEPARATION OF POWERS DOES NOT APPLY IN THIS CASE TO PERMIT JUDICIAL AVOIDANCE OF THE CONTROVERSIES PRESENTED

On several occasions this Court has expressed with unmistakeable clarity the doctrine that congressional investigations, including subsidiary questions of investigatory methods and authority, can and must be scrutinized in appropriate cases. Deference to the powers and duties of a coordinate branch of government "cannot yield to an unnecessary and unreasonable dissipation of precious constitutional freedoms." *Watkins v. United States*, 354 U.S. 178, 204 (1957). The mere possibility of conflict cannot justify avoidance of the judiciary's constitutional duty to protect and insure the rights of citizens. *Powell v. McCormack*, 395 U.S. 486 (1969); *Barenblatt v. United States*, 360 U.S. 109 (1959). See also, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Kilbourn v. Thompson*, 103 U.S. 168 (1880); and *United States v. Rumely*, 345 U.S. 41 (1953).

In *Kilbourn v. Thompson, supra*, quoting from Mr. Justice Hoar in *Burnham v. Morrissey*, 14 Gray 226 (Mass. 1859), this Court said (103 U.S. at 199):

> The House of Representatives is not the final judge of its own power and privileges in cases in which the rights and liberties of the subject are concerned, but the legality of its action may be examined and determined by this court.... Especially is it competent and proper for this court to consider whether its proceedings are in conformity with the Constitution and laws, because living under a written Constitution, no branch or department of the government is supreme; and it is the province

> and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of government, and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution. . . .

More recently, in *Powell v. McCormack, supra,* this Court reaffirmed its role as the guardian of individual rights within the checks and balances system of our government. In *Powell,* this Court held that the activities of the House of Representatives in excluding a member was not an activity entrusted by the Constitution solely to the House and, therefore, the Court concluded that judicial consideration was not foreclosed.

The *Powell* decision reiterated the teaching of *Baker v. Carr,* 369 U.S. 186 (1962), that the separation of powers doctrine bars judicial scrutiny of legislative action *only* where at least one of the following factors is present (369 U.S. at 217):

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

That the present controversy does not fall within the *Baker v. Carr* formulation is made clear in *Powell, supra.*

In *Powell*, this Court applied the principles annunciated in *Baker* in a federal context, holding that the separation of powers doctrine did not bar judicial consideration of a challenge to the attempted exclusion of a congressman by the House of Representatives. The Court held that since a judicial determination of Congressman Powell's rights required "no more than an interpretation of the Constitution," the controversy involved neither "an initial policy determination of a kind clearly for nonjudicial discretion, nor a lack of respect due a coordinate branch of government." 395 U.S. at 548-549. The Court then concluded (395 U.S. at 548-549):

> "... Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility. See *United States v. Brown*, 381 U.S. 437, 462 (1965); *Youngstown Sheet Tube Co. v. Sawyer*, 343 U.S. 579, 613-614 (1952) (Frankfurter, J., concurring); *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting)." (Footnote omitted).

Thus, although the power of Congress to conduct investigations and to publish its findings is broad, it is not unlimited. As stated in *Watkins, supra* (354 U.S. 198-199):

> We cannot simply assume ...that every congressional investigation is justified by a public need that overbalances any private rights affected. To do so would be to abdicate the responsibility placed by the Constitution upon the judiciary to insure that the Congress does not unjustifiably encroach upon an individual's right to privacy....

Where congressional investigations and reports, no matter how laudable their objectives, encroach upon constitutionally protected liberties, an overriding governmental interest must affirmatively be shown. *Barenblatt v. United States, supra,* 360 U.S. at 126-127. See also, *Stamler v. Willis,* 415 F.2d 1365 (7th Cir. 1969), *cert. denied,* 399 U.S. 924 (1970), where the Court of Appeals reversed the dismissal of a civil action seeking declaratory and injunctive relief alleging misconduct on the part of a House Committee (415 F.2d at 1369-1370):

> "We conclude that plaintiffs' claims should be considered on the merits even though a coordinate branch of the Government is involved. The judiciary has always borne the basic responsibility for protecting individuals against unconstitutional invasions of their rights by all branches of the Government. (Footnote omitted).

This same necessity for judicial intervention was observed by Judge Medina, in *Wolff v. Selective Service Local Board No. 16,* 372 F.2d 817, 824-825 (2d Cir. 1967):

> Where basic constitutional rights are imperiled, the courts have not required a series of injured parties to litigate the permissible scope of the statute or administrative interpretation but have nullified the unconstitutional action and required the Government to start in the first instance with a statute or interpretation that will not so overhang free expression that the legitimate exercise of constitutionally protected rights is suppressed.

Petitioners have no other forum in which to assert their constitutional rights, and judicial intervention is therefore imperative. Petitioners had no advance notice that their names would be published in unfavorable and highly embarrassing contexts, and they had no oppor-

tunity to persuade Congress, the Committee, or individual committee members from taking this action. In *Yellen v. United States*, 374 U.S. 109 (1963), this Court held that a lack of proper congressional procedures or action is sometimes sufficient to justify protective action by the Courts. In this case, petitioners' names were printed in the report without their knowledge, and without notice to them or to any other persons who might have protected their interests.[22] Ten years ago this Court concluded that "under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances." *N.A.A.C.P. v. Button*, 371 U.S. 415, 430 (1962). The federal judiciary must continue its historic intervention and provision of remedies in cases of unconstitutional deprivations through legislative investigations, and in this case it should consider the substantial claims of petitioners who are children, poor and black, and who did nothing to deserve the treatment they received except attend public schools as the law requires.

This Court has emphasized the vigilant protection it will give to the constitutional rights of children. *Shelton v. Tucker, supra; Tinker v. Des Moines Community School District, supra.* The judiciary cannot shun its proper role of adjudicating this controversy "if we are not to strangle the free mind at its source and teach youth to discount important principles of our govern-

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[22] As noted, *supra*, petitioners filed a motion to sever and dismiss as to several of the congressmen respondents on the grounds that they opposed the distribution of the report so long as the petitioners' names remained therein and that they would have voted against the publication of the report had they been given an opportunity to do so.

ment as mere platitudes." *West Virginia v. Barnette*, 319 U.S. 624, 637 (1943).

III.

THE SPEECH OR DEBATE CLAUSE IMMUNIZES NEITHER LEGISLATIVE AIDES NOR CONGRESSMEN THEMSELVES FROM PRIVATE SUIT ALLEGING UNCONSTITUTIONAL INVASIONS OF PRIVACY, PUBLICATION OF A BILL OF ATTAINDER AND DENIAL OF PROCEDURAL DUE PROCESS, WITHOUT EVEN PRIMA FACIA AUTHORIZATION BY HOUSE RESOLUTION

On several occasions, beginning in 1880, this Court has reviewed the scope and application of the Speech or Debate Clause when the federal judiciary has been called upon to adjudicate claims that Congressmen, Senators, and legislative employees have acted unlawfully or unconstitutionally. In *Kilbourn v. Thompson*, 103 U.S. 168 (1880), Kilbourn was arrested and imprisoned pursuant to a House Resolution for his refusal to testify at a Committee hearing. Claiming false imprisonment, Kilbourn sued the members of the Committee and the Sergeant-at-Arms who had executed the warrant. This Court declared the resolution unconstitutional and held that the Sergeant-at-Arms was not protected from suit by the Speech or Debate Clause, even though Kilbourn's complaint was held to be properly dismissed as to the Congressmen. Similarly, in *Dombrowski v. Eastland*, 387 U.S. 82 (1967), this Court held that the Speech or Debate Clause did not immunize the chief counsel of the Senate Internal Security Subcommittee from suit alleging violation of Fourth Amendment rights, and in *Powell v. McCormack*, 395 U.S. 486 (1969), this Court held that an action by an excluded member of Congress seeking his

seat, restoration of his seniority privileges and back pay was maintainable against House employees. Most recently, in *Gravel v. United States*, ___U.S.___ (Slip Opinion, June 29, 1972), this Court declared that:

> . . . no prior case has held that Members of Congress would be immune if they execute an invalid resolution by themselves carrying out an illegal arrest, or if, in order to secure information for a hearing, themselves seize the property *or invade the privacy of a citizen*. Neither they nor their aides should be immune from liability or questioning in such circumstances. Such acts are no more essential to legislating than the conduct held unprotected in *United States v. Johnson*, 383 U.S. 169 (1966). *Gravel, supra*, ___U.S. at___ (Slip Opinion at 14) (Footnote omitted, emphasis added).

This Court concluded in *Gravel*, after reviewing *Kilbourn*, *Dombrowski*, and *Powell*, that "[t]he three cases reflected a decidedly jaundiced view towards extending the clause so as to privilege illegal or unconstitutional conduct beyond that essential to foreclose executive control of legislative speech or debate and associated matters such as voting and committee reports and proceedings." ___U.S. at___ (Slip Opinion at 13-14).

Part II of the *Gravel* decision (and the separate opinions) reviewed extensively the pre-constitutional antecedents of the Speech or Debate privilege, and in the Brief for the United States filed by the Solicitor General this pre-constitutional history and the intent of the framers were summarized (pp. 17-22, 22-24), as part of the Solicitor's argument that only Senators and Representatives are privileged under the Clause, and that because of the pre-constitutional history there was a conscious rejection by the framers of any privilege on

behalf of other persons whom legislators from time to time might wish to bring within the ambit of their own protection. This limitation has been carried forward in decisions of this Court, for example, in *Powell* and *Dombrowski, supra:*

> This Court has held, however, that this doctrine [of legislative immunity] is less absolute, although applicable, when applied to officers or employees of a legislative body, rather than to legislators themselves.

Dombrowski, 387 U.S. at 85.

We submit that the scope of the Speech or Debate Clause privilege, as originally intended by the framers in light of preconstitutional history, and as carried forward by this Court in the *Kilbourn-Dombrowski-Powell-Gravel* line of cases is not such as to provide the respondents here with any proper claim, absolute or qualified, to be immune from answering before the federal judiciary to the claims of petitioners. Certainly this is so under the circumstances of this case, where the actions of committee personnel were not authorized, they were unconstitutional, they were completely outside the outer perimeter of their scope of authority, and they were conducted in a surreptious and clandestine manner calculated to avoid notice to petitioners that their rights were being violated until after the series of unconstitutional and unauthorized actions had been consummated through an irretrievable publication and dissemination of the committee report.

A. Neither the Obtaining Nor the Method of Obtaining and Publishing Petitioners' Private, Confidential and Privileged School Records Were Protected Legislative Acts Because They Were Not Authorized by the House Resolution, and Because the Acts Were Unconstitutional

The *Gravel* decision highlighted an element of analysis in cases involving the Speech or Debate Clause which had not been emphasized in earlier decisions, namely, an analysis of the question of whether the acts complained of are "protected legislative" acts. If so, the congressmen who perform them are immunized under this Speech or Debate Clause, as are legislative personnel insofar as their conduct would constitute protected legislative acts if performed by a member himself. As demonstrated above, and in Part I of this Brief, the acts complained of here were not "protected legislative acts" because they were direct constitutional violations; however, an alternative question for decision is whether the nature of the legislative investigation was authorized by the House Resolution, and more particularly, whether the student records and papers which were seized and published, and the method of their procurement, were authorized. *Watkins v. United States*, 354 U.S. 178 (1957) (see especially, Frankfurter, J., concurring opinion); *United States v. Rumely*, 345 U.S. 41 (1953); *Barenblatt v. United States*, 360 U.S. 109 (1959).

In *United States v. Rumely, supra*, this Court reviewed the scope of a Congressional resolution authorizing a committee to investigate lobbying activities and held, according to the terms of the authorizing resolution, that the Committee had no authority to compel the production of information sought from a witness. Accordingly, the contempt conviction of the witness was

reversed by the Court of Appeals, which action was affirmed by this Court.[23] In this case, of course, there could be no question about the right or duty of either the teacher or principal at the Jefferson Junior High School to refuse the production of documents requested by the committee investigator.[24]

The Resolution involved here [H. Res. 76, 91st Cong., 1st Sess., Feb. 5, 1969 (App. 45-46)], while it authorized procurement of documents relevant to a valid investigation, did not authorize the Committee staff to utilize the services of a District of Columbia policeman, apparently moonlighting as a free-lance investigator for the House Committee staff, surreptitiously to obtain the private and confidential documents involved here, or if so, to obtain the documents in the fashion in which they were obtained. It is clear from the resolution itself that it contained no such peculiar authority:

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[23] See also, *Watkins v. United States, supra,* especially Justice Frankfurter's concurring opinion wherein he states that the scope of a congressional committee's inquiry must be defined with sufficient clarity to safeguard a witness from the hazards of vagueness in the enforcement of criminal process.

[24] The majority opinion of the court below (App. 90) made the assumption that, "the failure of an official to cooperate when matters under his control are being examined by a congressional committee would amount to malfeasance in office." We disagree. "No man in this country is so high that he is above the law. No officer of the law may set the law at defiance, with impunity. All the officers of the government, from the highest to the lowest are creatures of the law and are bound to obey it." *United States v. Lee,* 106 U.S. 196 (1882). It is the duty of any governmental official to *refuse* to cooperate in an unauthorized, unconstitutional inquisition into private, confidential and privileged student records.

> For the purpose of carrying out this resolution the Committee or subcommittee is authorized to sit and act during the present congress at such times and places within the United States, whether the House is in session, has recessed, or has adjourned, *to hold such hearings, and to require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memorandums, papers, and documents as it deems necessary;* . . . . Id. (App. 45, emphasis added).

While the Resolution authorized the obtaining or production of documents, "by subpoena or otherwise," the plain language of the Resolution specifically limited the method and circumstances of document production or procurement *to formal procedures during actual hearings of the Committee or subcommittee.* Both the complaint (para. 7, App. 9) and the statement of counsel for petitioners before the District Court (Tr. 11, App. 27) clearly alleged that the obtaining of the documents in question was not at or pursuant to formal hearings; rather, it was through surreptitious and clandestine private meetings of the Committee's investigator with a teacher and the principal of the Jefferson Junior High School.

In addition to the fact that the authorizing Resolution did not permit the acquisition of documents by the methods used by respondents Martin and Little, Rule XI 27(m) of the House Rules provides safeguards when investigatory hearings are being conducted by a House Committee. Rule XI 27(m) provides:

> If the committee determines that evidence or testimony at an investigative hearing may tend to defame, degrade, or incriminate any person, it shall–
>
> (1) receive such evidence or testimony in executive sessions;

(2) afford such person an opportunity voluntarily to appear as a witness; and
(3) receive and dispose of requests from such person to subpena [sic] additional witnesses.

The fact that the information identifying petitioners as criminals, dunces, class-cutters, disciplinary problems or sexually promiscious was obtained by surreptitious investigation rather than in open hearing is all the more reason why, at the least, the protections set forth in Rule XI 27(m) should have been applied. None of the school children mentioned in the Report have ever had the chance to refute the unproven allegations in their school records that they were sexually promiscious or thiefs, nor were they given an opportunity to demonstrate that their school attendance records should reflect valid reasons of health or otherwise which contributed to their inattendance. But most importantly, neither the students nor their parents were given a chance to contest, before the fact, the unfaithful actions of school personnel in divulging the documents, or to seek to obtain from the Committee or any of its members minimal protections of their privacy. Basic opportunities for fair play and procedural due process were never accorded to these young people in the District of Columbia school system. Certainly, a document alleging that a named child "is involved in the loss of fifty cents" (Report, p. 256), or "invited a male substitute [teacher] to have sexual relations with her by gapping her legs open for enticement" (Report, p. 256) is such that it would tend to defame, degrade or incriminate that child.

The decision by the Court of Appeals concluded that the actions of the Congressional respondents were authorized—that they were acting within their "sphere of legitimate legislative activity." Although the lower court's

opinion recited this as the standard, citing *Tenney v. Brandhove*, 341 U.S. 367 (1951) (see App. 79-80), the lower court engaged in no analysis whatever of the standard as applied to this case.[25]

The opinion merely recited the standard and reached a conclusion. Nor did the Court of Appeals analyze the question of whether Rule XI 27(m) of the House of Representatives authorized the method by which the documents were obtained and published (App. 75-77, Footnote 10). In fact, the lower court expressly refused to decide this question, stating that the question "was not properly asserted" in the District Court. Relying upon *Hormel v. Helvering*, 312 U.S. 552 (1941), and earlier decisions of this Court, the opinion below found that petitioners had not "demonstrated the existence of any exceptional circumstances which might warrant divergence" from the general principle announced in *Hormel*—that questions be presented to lower courts prior to analysis by the Supreme Court. However, the avoidance by the Court of Appeals of making a decision on this issue was premised upon a complete mischaracterization of the question.

A distinction must be made between the question of whether committee personnel were authorized under the

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[25] The lower court further made the inaccurate observation that petitioners had not contended that any of the Federal legislative employees had acted outside the sphere of their official duties (App. 83), despite the clear allegations of the complaint (See, *e.g.*, Complaint, paras. 10, 13 and 14, App. 9-11) which included the contention that the publication of petitioners' names by the Congressional defendants "was wholly devoid of any valid legislative purpose" (Complaint, para. 10), and allegations of unconstitutional actions in the procurement of the student records and papers.

House Resolution to obtain the documents at all, or in the manner in which they were obtained, and the question of whether the documents were subsequently inserted into the committee report in violation of Rule XI 27(m). A proper characterization of the manner and timeliness of the presentation by petitioners of these two somewhat related questions requires an understanding of the extremely summary manner in which petitioners were treated in the District Court. Petitioners filed the complaint on January 8, 1971 and on the same day, at 4:30 p.m. the court heard petitioners' motion for a temporary restraining order. The hearing lasted less than one hour, adjourning at 5:20 p.m., during which the District Court dismissed the complaint, *sua sponte*, as "frivolous," without a motion to dismiss, a motion for summary judgment, or any other responsive pleading having been filed by any of the defendants. Petitioners were thus put in the untenable position of having no advance notice whatever that the hearing on their motion for a temporary restraining order would result in an opportunity of only a few minutes' duration to present rejoinder arguments.

The Court of Appeals' refusal to examine and decide on their merits the important questions of whether the House Resolution authorized the obtaining of the documents in question or the method of their procurement, and the question of whether House Rule XI 27(m) had been violated, for the reason that the issue "was never raised in the District Court," failed to recognize the exceptional circumstances appearing clearly on the record.

> Rules of Practice and Procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice

> under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.

Hormel, supra, 312 U.S. at 557. This case does present exceptional circumstances which were totally beyond the control of petitioners. After all, petitioners were never given an opportunity in the District Court to address these questions. Close analysis demonstrates that they are essentially rebuttal responses to defenses asserted by the respondents in the context of a *sua sponte* dismissal of the complaint by the District Court which was hardly forseeable.

When the respondents made their oral presentation in the District Court that they were immune from liability, and before the court contemplated dismissal, the court should have examined several other issues not directly relevant to the question of temporary injunctive relief, preferably on the basis of a written motion to dismiss whereby petitioners would have had the opportunity to develop fully their rebuttal arguments.

Respondents lacked the authority to seize petitioners' private school records in the manner employed, and they breached the Rule of the House which would have provided some minimal protection to petitioners' privacy. These questions were briefed and argued at the earliest opportunity. This Court should recognize the congressional respondents' gross usurpation of unconstitutional authority, should recognize their failure to accord the minimal protections of privacy required by the Rules of the House and should declare, at the least, that petitioners are entitled to demonstrate the inapplicability

of official immunity or Speech or Debate Clause immunity in this case. The federal respondents acted beyond the scope of their authority, *Wheeldin v. Wheeler*, 373 U.S. 647 (1963), and beyond the outer perimeter of their line of duty, *Barr v. Matteo*, 360 U.S. 564 (1959). Their conduct, therefore, cannot constitute protected legislative acts, and they cannot be shielded by the Speech or Debate Clause.

> No man in this country is so high that he is above the law. No officer of the law may set the law at defiance, with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law and are bound to obey it.
>
> It is the only supreme power in our system of government, and every man, who by accepting office, participates in its functions, is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.
>
> Courts of justice are established not only to decide upon the controverted rights of the citizens as against each other, but also upon the rights in controversy between them and the Government,
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> . . . .

United States v. Lee, 106 U.S. 196, 220 (1882).

B. The Procurement and Publication of Petitioners' School Records Were Not Legislative Acts and Therefore Not Protected from Judicial Scrutiny, and to the Extend That They May Be Considered To Be Legislative Acts They Are Subject to Judicial Scrutiny Through Private Suit Because the Actions Constituted or Were Tantamount to a Bill of Attainder and Involved a Substantial Violation of Petitioners' Right to Due Process of Law.

To the extent that this Court's recent decision in *Gravel, supra,* speaks to the questions presented in this case, it would appear that an additional threshold question on the issue of Speech or Debate Clause immunity is the question of whether the actions complained of by petitioners were "protected legislative acts." As shown above in Parts I and III, the actions cannot constitute protected legislative acts because they were plainly unconstitutional and without proper legislative authority. In addition, the Constitution itself contains an express prohibition of bills of attainder, thereby imposing an inherent limitation on the scope of Speech or Debate Clause immunity.

The publication by the House of Representatives of the Committee Report containing petitioners' names constitutes a bill of attainder. "A bill of attainder is a legislative act which inflicts punishment without a judicial trial." *Cummings v. Missouri,* 71 U.S. (4 Wall) 277, 323 (1867). There can be no question but that the publication of the names of students tied to absentee lists, failing test papers, disciplinary memoranda alleging sexual immorality and delinquency, and other private and confidential student records, inflicts punishment upon the student. The punishment consists of affixing a public

badge of disgrace and dishonor upon a person's good name, reputation and integrity, when identified, without trial, as a dunce, a juvenile delinquent, or as sexually promiscuous. Such punishment is prohibited by the Constitution of the United States, Article I, Section 9, which provides that "No bill of attainder or ex post facto law shall be passed."

The Supreme Court has spoken to attempts by the legislature to punish citizens by such bills and has specifically prohibited them. *Cummings v. Missouri, supra; United States v. Lovett,* 328 U.S. 303 (1946).

The report is, in the recent words of former Chief Justice Warren, "the evil the Framers had sought to bar: legislative punishment, of any form or severity, of specifically designated persons or groups." *United States v. Brown,* 381 U.S. 437, 447 (1965). The constitutional prohibition against the bill of attainder has a special and demanding importance in this case. The "reasons for its inclusion in the Constitution and the evils it was designed to eliminate" (*Brown, supra,* at 442), are particularly germane to the issues raised in this case. As recalled by the Court in *Brown:*

> The best available evidence, the writings of the architects of our constitutional system, indicates that the Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature. 381 U.S. at 442.

The doctrine of separation of powers, therefore, completely contrary to the lower court's assumption, requires judicial intervention to strike down the action of

Congress in this case as a "legislative act which inflicts punishment without a judicial trial." *Cummings v. Missouri, supra,* 71 U.S. at 323. As was pointed out in *Brown* (381 U.S. at 445):

> The Bill of Attainder clause not only was intended as one implementation of the general principle of fractionalized power, but also reflected the Framer's belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of and levying appropriate punishment upon, specific persons.

Consequently, a bill of attainder generates a special and unique demand on the court—a compulsion more urgent and imperative than even the striking down of an unconstitutional statute. The reason is simple: a bill of attainder represents usurpation by the legislature of the functions assigned to the judiciary. The integrity of the judicial function itself is transgressed.[26] In *United States v. Lovett, supra,* this Court, again facing a challenge to

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[26]The intensity of the opposition of the Framers of the Constitution to bills of attainder has been especially noted by Justice Black: "Are there circumstances under which Congress could, after nothing more than a legislative bill of attainder, take away a man's life, liberty, or property? Hostility of the Framers toward bills of attainder was so great that they took the unusual step of barring such legislative punishments by the States as well as the Federal government. They wanted to remove any possibility of such proceedings anywhere in this country. This is not strange in view of the fact that they were much closer than we are to the great Act of Attainder by the Irish Parliament, in 1688, which condemned between two and three thousand men, women, and children to exile or death without anything that even resembled a trial." Black, "The Bill of Rights and the Federal Government" in E. Cahn, Ed., *The Great Rights,* at 57 (1963).

punitive action directed against named individuals, reminded us that (328 U.S. at 318):

> When the Constitution and Bill of Rights were written, our ancestors had ample reason to know that legislative trial and punishments were too dangerous to liberty to exist in the nation of free man they envisioned. And so they proscribed bills of attainder.

In the words of Justice Black for the Court in *Lovett*, this Court has no alternative but to say that "as much as we regret to declare" that the action by the congressional respondents violates the Constitution, "we have no alternative here." *Lovett, supra*, at 318.

As recently as the last term of this Court, the Constitutional proscription against bills of attainder was recalled by two justices of the Court in a case remarkably similar to this case. In *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), this Court ruled that the posting of names of persons who were not to be served alcoholic beverages in public establishments, under the authority of a state statute, was a violation of the requirements of procedural due process. While the due process considerations in *Constantineau* derived from the Fourteenth Amendment, the same considerations under the Fifth Amendment apply in this case involving federal and District of Columbia actions. But of added significance in *Constantineau* is that Mr. Justice Black, joined by Mr. Justice Blackmun, dissenting on different grounds (abstention), stated (440 U.S. at 444):

> The effect of such sweeping powers, if there is nothing else in the State's law to limit them, is practically the same as that of an old common-law bill of attainder against which our forebearers had such an abhorrence that they forbade it in Art. I,

§ 9, of the Constitution. See, e.g., *United States v. Lovett*, 328 U.S. 303 (1946). And here the Wisconsin law purports on its face to place such arbitrary and tyrannical power in the hands of minor officers and others that these modern bills of attainder can be issued ex parte, without notice or hearing of any kind or character.

IV.

THE JUDICIAL DOCTRINE OF OFFICIAL IMMUNITY IS NOT AVAILABLE TO ANY OF THE RESPONDENTS

Petitioners' complaint in the District Court presented primarily a case or controversy under the Constitution of the United States, and under the Civil Rights Act of 1871 (42 U.S.C. § 1983). The theory of the case is that all of the respondents violated petitioners' constitutional right to privacy warranting a declaratory judgment, injunctive relief and damages. Petitioners also contend that their action is maintainable against the federal respondents pursuant to the federal cause of action for damages articulated by this Court in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971);[27] that their

[27] When read together with *Wheeldin v. Wheeler, supra, Bivens* stands clearly for the propositions that the respondents here can be called to account before the federal judiciary on a federal cause of action for damages based upon their unconstitutional conduct, and that the scope of their legitimate authority, if any, must be examined. While the Court in *Bivens* articulated a federal cause of action for violations of citizens' right of privacy which we submit is controlling in this case, *Wheeldin* expressly stated that a congressional respondent can claim official immunity only if the conduct in question was performed within the scope of his authority. 373 U.S. 647 at 650-651. Justice Brennan's dissenting opinion in *Wheeldin*, observed that the official immunity announced in *Barr v. Matteo*, 360 U.S. 564, 575 (1969) is available only when the

action is maintainable against the District of Columbia respondents under the Civil Rights Act of 1871 because of the violation by these respondents of petitioners' constitutional rights under color of their state authority;[28] and that their action is maintainable as to all respondents on a common law tort cause of action (right of privacy) on the theory that the respondents were acting on their own, clearly beyond the outer perimeter of their rightful authority.

The lower courts in this case clothed the respondents with official (sovereign) immunity upon finding that they acted within the scope of their authority, but in doing so, the District Court precluded any meaningful discussion of the issue by its summary dismissal of the complaint, and the Court of Appeals affirmed that dismissal on the basis of official immunity. The Court of Appeals did not examine with any specificity petitioners' claim that respondents were not acting within the scope of their authority, and cannot so act when conduct is unconstitutional; and the Court of Appeals simply assumed (App. 90) that all of the respondents "have only

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governmental officer was acting within the outer perimeter of his line of duty. Justice Brennan observed (373 U.S. at 647) that "it has never been suggested that the immunity reaches beyond that perimeter, so as to shield the federal officer acting wholly on his own. A federal officer remains liable for acts committed 'manifestly or palpably beyond his authority.' *Spaulding v. Vilas*, 161 U.S. 483; . . . " See also, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); and *Bell v. Hood*, 327 U.S. 678 (1946).

[28] The District of Columbia is a "State or Territory" within the meaning of Section 1983 (Civil Rights Act of 1871 §1, R.S. §1979), *Hurd v. Hodge*, 334 U.S. 24 (1948); *Talbott v. Silver Bow County*, 139 U.S. 438 (1891); and *Sewell v. Pegelow*, 291 F.2d 196 (4th Cir. 1961). The Civil Rights Act of 1871 protects the constitutional right to privacy, *York v. Story*, 324 F.2d 450 (9th Cir. 1963), and the constitutionality guaranteed right to due process, *Barnes v. Merritt*, 376 F.2d 8 (5th Cir. 1967).

engaged in official conduct in furtherance of a duly authorized congressional investigation." This crucial conclusion merely begs the question. We submit that the doctrine of official immunity is wholly inoperative in this case, and in any event, that the doctrine was prematurely applied by the lower courts in direct violation of controlling precedent in the District of Columbia, which, in this area of judge-made immunity, has undergone substantial modifications during the past ten years by District of Columbia courts. Those modifications preclude the application of the official immunity doctrine in most of the classes of cases to which it had theretofore been applied. At the time this case was pending in the lower courts, the doctrine applied only to discretionary conduct by officials acting within the scope of their authority, and only upon a specific judicial determination that judicial redress would jeopardize the quality and efficiency of legitimate governmental activity. *Elgin v. District of Columbia*, 337 F.2d 152 (D.C. Cir. 1964); *Spencer v. General Hospital*, 425 F.2d 479 (D.C. Cir. 1969) (In Banc); *Graham v. District of Columbia*, 433 F.2d 536 (D.C. Cir. 1970); and *Carter v. Carlson*, 447 F.2d 358 (D.C. Cir. 1971), *cert. granted* on a separate issue,[29] *sub nom. District of Columbia v. Carter*, ___U.S.___, 30 L.Ed.2d 161 (1972).

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[29] The questions presented in *District of Columbia v. Carter* do not include the District of Columbia modification in the application of the official immunity doctrine. The only question presented in *Carter* in this Court is whether the District of Columbia is a "person" within the meaning of the Civil Rights Act of 1871, 42 U.S.C. §1983, such as to permit the application of the statutory remedy against the District of Columbia directly, in addition to its application, under the doctrine of respondeat superior, for torts committed by officials and employees of the District of Columbia government.

In *Elgin v. District of Columbia, supra,* the United States Court of Appeals for the District of Columbia Circuit was presented with a lower court dismissal, prior to trial, of a complaint alleging negligence by the District of Columbia in failing to provide or maintain properly a railing or other safeguard around a depressed area in a school playground. The court's decision avoided passing upon the question of whether the doctrine of sovereign immunity should be abolished altogether. Instead, the court fashioned a major exception to the traditional rule which distinguished between governmental and proprietary functions and held that the District of Columbia would be immune from liability for torts only where the governmental function involved was of a "discretionary" character–thereby making the District of Columbia liable for torts committed in the performance of "ministerial" functions. The significance of the *Elgin* case here, however, is the further determination that governmental immunity should not be defined solely by the discretionary-ministerial distinction; rather, in each case the court should inquire into the function of the act itself and the reason for governmental immunity. In subsequent cases this refreshing approach has been crystalized such that at the time the instant case was decided by a panel of the United States Court of Appeals for the District of Columbia Circuit, the doctrine had recently been articulated, only a few months earlier, in *Carter v. Carlson,* 447 F.2d at 362:

> . . . in determining whether a particular government function falls within the scope of official immunity, it does not suffice to consider simply whether the officer has 'discretion' in the sense that he exercised his judgment in choosing among alternative courses of action. The proper approach is to consider the precise function at issue and to

determine whether an officer is likely to be unduly inhibited in the performance of that function by a threat of liability for tortious conduct.

Disdaining its own teaching in *Carter*, however, the Court of Appeals in this case (although a different panel of judges) simply concluded that the conduct of the respondents was discretionary in nature. Such a holding was directly in violation of the manner in which claims of official immunity are to be adjudicated. The *Carter* decision distinguished *Barr v. Matteo*, 360 U.S. 564 (1959), and decreed a different approach, although not necessarily a contrary one, for trial courts to employ in examining the discretionary-ministerial question. However, when reviewing petitioners' claims, the majority of the lower court's three-judge panel in this case completely ignored ten years of judicial precedent in the District of Columbia. This curious method of adjudication was the more confounding by the failure of the court's opinion to even acknowledge the existence of the *Elgin-Carter* line of decisions while in at least one other case raising the same issue and decided after *Carter*, a three-judge panel of the same court followed *Carter* as decisionally binding. In *Baker v. Washington*, 448 F.2d 1200 (D.C. Cir. 1971), Judges Fahy, Robinson and Wilkey applied the *Carter* doctrine and reversed the dismissal of Baker's complaint. The District Court had dismissed the complaint under the doctrine of official immunity, stating that the actions complained of were discretionary. As in *Carter*, the Court in *Baker* held that the real test which must be applied is whether the injury resulting from a tortious act can be subjected to judicial redress without thereby jeopardizing the quality and effiency of government itself. No demonstration of such jeopardy has been made in this case, and none can be

made because direct and immediate violations of citizens' constitutional rights cannot be considered governmental functions at all—thereby answering in the negative the question of whether judicial redress here would jeopardize the quality and efficiency of government; it would be improved rather than jeopardized by a declaratory judgment in this case that private, confidential and privileged student records in public schools must be protected from public disclosure. It is not a function of our government to divulge and publish the names of private citizens together with highly embarrassing and scandalous private information derived solely through the legal compulsion of public school attendance. The narrow injunctive relief requested, merely a restraint on further publication or dissemination of petitioners' names and addresses, in no way would interfere with any legitimate interest by Congress or the public in the contents of the documents themselves; rather, it would protect the privacy and anonymity of the petitioners by the mere excision of identifying characteristics in the documents themselves.

The opinion of the Court of Appeals (App. 87, Fn. 23) did not reach the question of injunctive relief, on the basis of the Policy Statement enacted by the School Board on February 17, 1971 (after the fact). Peititioners submit that this Policy Statement (appearing as an appendix to the Court of Appeals Opinion, App. 93-94) lacks any efficacy whatsoever. In no way does it restrain future publication or dissemination of the documents in question by the federal respondents; but more importantly, the policy statement itself is totally defective in that it provides no opportunity whatever to school children or their parents to intervene in any instance where school officials may be requested or tempted to

divulge private student documents and papers. The provision in the Policy Statement of review by the Board of Education or by the Superintendent does not take into account the fundamental interest of students and their parents in the question of disclosing student information.

The courts below also ruled that the complaint must be dismissed on the grounds that it failed to state a claim upon which relief could be granted, and the district court dismissed the complaint as "frivolous", within hours after it was filed.

For the purposes of dismissing a complaint, all well pleaded material allegations of the complaint must be taken to be admitted. *Jenkins v. McKeithen*, 395 U.S. 411 (1965); *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965). A complaint must be liberally construed in favor of a plaintiff. *Conley v. Gibson*, 355 U.S. 41 (1957). A complaint should not be dismissed unless it appears that plaintiffs could prove no set of facts in support of their claim which would entitle them to relief. *Jenkins, supra*, 395 U.S. at 422.

We submit that the deference to which the allegations of a well pleaded complaint are entitled and general principles of procedural regularity and fairness require a reinstatement of the complaint in this case which was dismissed in a most peculiar and summary fashion, literally on the court's own motion, within hours after the complaint was filed.

CONCLUSION

This Court is respectfully requested to declare the constitutional right of petitioners to be secure in their privacy and to be possessed of the right to invoke the jurisdiction of the federal judiciary in their efforts to obtain a declaration of their rights, injunctive relief and damages; to declare this case to be justiciable and the claims subject to judicial scrutiny; to declare the immunity provided by the Speech or Debate Clause to be unavailable to any of the respondents; and to declare that the doctrine of official immunity was inappropriately applied by the lower courts and that it is not available to any of the respondents because their conduct was not within the scope of their lawful authority.

Respectfully submitted,

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